

IAL

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MAY 15 2008

at 11 o'clock and 45 min. A.M.

SUE BEITIA, CLERK

Leandro Gomez, III

NAME

40390-048

PRISON IDENTIFICATION/BOOKING NO.

P.O. Box 5500

ADDRESS OR PLACE OF CONFINEMENT

Adelanto, CA 92301

Note: If represented by an attorney, provide name, address & telephone number. It is your responsibility to notify the Clerk of Court in writing of any change of address.

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

Leandro Gomez, III

Movant

FULL NAME OF MOVANT

(Include name under which you were convicted)

Petitioner.

CASE NUMBER:

CV

To be supplied by the Clerk of the United States District Court

CR 05-00300-JMS

Criminal case under which sentence was imposed.

**MOTION TO VACATE, SET ASIDE OR
CORRECT SENTENCE BY A PERSON IN
FEDERAL CUSTODY**

28 U.S.C § 2255

INSTRUCTIONS - READ CAREFULLY

This motion must be legibly handwritten or typewritten and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any questions use reverse side of sheet.

Additional pages are not permitted. No citation or authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

Upon receipt, your motion will be filed if it is in proper order. NO FEE is required with this motion

If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in a different districts, you must file separate motions as to each judgment.

Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

When the motion is fully completed, the original and three (3) copies must be mailed to the Clerk of the United States District Court, whose address is 312 North Spring Street, Los Angeles, California 90012.

MOTION

1. Name and location of court which entered judgment of conviction under attack: Honorable United States District Court for the District of Hawaii, Honolulu [See Attached Brief]

2. Date of judgment of conviction: July 2006

3. Length of sentence: 286 Months Sentencing judge: Justice Seabright

4. Nature of offense or offenses for which you were convicted: Conspiracy to distribute methamphetamine

5. What was your plea? (check one)

- ☐ Not guilty
☒ Guilty
☐ Nolo Contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

Not Applicable

6. Kind of trial: (check one)

- ☐ Jury
☒ Judge only

7. Did you testify at the trial?

- ☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

- ☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court HONORABLE UNITED STATES DISTRICT COURT, HONOLULU, HAWAII

(b) Result ANDERS BRIEF FILED

APPEAL DISMISSED? DENIED

(c) Date of result JULY 2007

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

☐ Yes ☒ No

11. If your answer to question number 10 was "yes", give the following information:

(a) (1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(5) Result _____

(6) Date of result _____

(b) (1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☐ No

(5) Result _____

(6) Date of result _____

(c) (1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☐ No

(5) Result _____

(6) Date of result _____

(d) Did you appeal, to an appellate federal court having jurisdiction, the results of action taken on any petition, application or motion?

(1) First petition, etc. ☐ Yes ☒ No

(2) Second petition, etc. ☐ Yes ☒ No

(3) Third petition, etc. ☐ Yes ☒ No

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

AFTER THE ANDERS BRIEF WAS FILED AND A DISMISSAL/DENIAL ISSUED
I WAS INFORMED THAT THIS WOULD BE THE ONLY AVAILABLE VEHICLE TO
USE.

12. State concisely every ground on which you claim that you are being held unlawfully.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date. For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you selected one or more of these grounds for relief, you must allege facts in support of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: INEFFECTIVE ASSISTANCE OF COUNSEL

Supporting facts (tell your story briefly without citing cases or law): _____

SEE ATTACHED BRIEF

B. Ground two: _____

Supporting facts (tell your story briefly without citing cases or law): _____

C. Ground three: _____

Supporting facts (tell your story briefly without citing cases or law): _____

D. Ground four: _____

Supporting facts (tell your story briefly without citing cases or law): _____

13. If any of the grounds listed in 12 A, B, C and D were not previously presented, state briefly what grounds were not presented, and give your reasons for not presenting them: _____

COUNSEL DID NOT WANT TO ADDRESS THE ISSUE OF HIS INEFFECTIVE REPRESENTATION
IN THE BODY OF THE APPEAL

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

☐ Yes ☒ No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attached herein:

(a) At a preliminary hearing: Attorney Ken Elliot

(b) At arraignment and plea: Attorney Ken Elliot

(c) At trial: Attorney Ken Elliot

(d) At sentencing: Attorney Ken Elliot

(e) On appeal: Attorney Ken Elliot

(f) In any post-conviction proceeding: Not Applicable

(g) On appeal from any adverse ruling in a post-conviction proceeding: Not Applicable

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court at approximately the same time?

☐ Yes ☒ No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☐ Yes ☒ No

(a) If so, give the name and location of the court which imposed sentence to be served in the future: _____

Not Applicable

(b) Give the date and length of sentence to be served in the future: _____

Not Applicable

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed sentence to be served in the future?

☐ Yes ☒ No

WHEREFORE, movant prays that the court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on

MAY 12 - 08
Date

[Signature]
Signature of Movant

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII, HONOLULU

UNITED STATES OF AMERICA,)
Plaintiff,)
v)
LEANDRO GOMEZ, III,)
Movant,)

Case No.: CR-05-00300-JMS

MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A
PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. §2255

Comes now Movant, Leandro Gomez III, pro se and requests that this Honorable United States District Court, for the District of Hawaii, Honolulu, accept and file this motion pursuant to title 28 U.S.C. §2255, in accordance with the Federal Rules of Criminal Procedure.

Movant contends that he is a layman to law, and that he will to the very best of his capacity provide this Honorable United States District Court with the appropriate filings and responses as set forth by the Federal Rules of Criminal Procedure.

STATEMENT OF FACTS

On or about October 2006, Movant was sentenced by this Honorable United States District Court, for the District of Hawaii, Honolulu to a term of 286 [two hundred eighty six] months for conspiracy to distribute methamphetamine. Counsel for Movant was Attorney of Record, Ken Elliot.

Prior to sentencing of Movant, Counselor Ken Elliot had informed Movant that if Movant would enter a guilty plea, the Kingpin Leadership role which had been placed on Movant, would be dropped to a Manager role, and that Counsel would argue the Manager role to be dropped at sentencing. Counsel stated that he would argue that Movant could not have any 'role' level imposed on him as Movant never employed anyone to work under him in any capacity, therefore demonstrating that there was not enough evidence to support any type of 'role.'

At sentencing, during the 'discussion' phase, Counsel made no attempt to argue the Manager role with this Honorable United States District Court; neither did Counsel address this issue at any time during the sentencing hearing. This burden fell to the Movant whom as declared at the beginning of this brief, is a layman of the law and had no prior litigation experience in any type of legal proceedings. The issue regarding the

Manager role for Movant was affirmed and a sentence was duly imposed by this Honorable United States District Court.

GROUND FOR RELIEF

Movant asserts that under Strickland v Washington 466 US 668, 80 L.Ed 2d 674, 104 S.Ct. 2052 that the parameters of Ineffective Assistance of Counsel were established. By definition of the above referenced case law, Counselor Ken Elliot meets both prongs necessary to meet the criteria for Ineffective Assistance of Counsel.

First, Movant must show that Counsel's performance was deficient. Movant contends that by Counselor Elliot NOT arguing an integral element of the case, clearly demonstrated deficient representation. Some argument would always be construed as better than no argument at all, as is the case herein.

Second, Movant must show that this deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Movant contends that because Counsel's deficiency is not arguing an element of sentencing during the sentencing phase [i.e.: Managerial role should not have been applied as Movant did not have anyone 'working' for or under him] that had this

issue been properly presented to this HOnorable United States District Court ofr the District of Hawaii, Honolulu, and had this issue been argued by Counsel, the setence of 286 [two hundred eighty six] months could very well have been much less had the Managerial role been removed during sentencing.

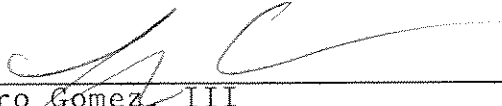
Furthermore, Movant asserts that he had been assured by Counselor Elliot that if Movant were to enter a plea of guilty that 1) The Kingpin Leadership role would be reduced to a Manager role and that 2) Counsel promised to argue the Manager role at sentencing to illustrate that this leadership role had been inappropriately applied. Had Movant been aware that Counsel would have been so deficient with rewspect to his representation during sentencing, Movant may not have agreed to entering a guilty ple and quite possibly would have requested that this Honorable United States District Court appoint new Counsel. Clearly Strickland v Washington is quite explicit in that 'some representation is always better than none' in this case, Counsel's lack of representation regarding an element contingent on determining adequate sentencing, constitutes representation equal to none.

PRAYER FOR RELIEF

Movant prays that this Honorable United States District Court for the District of Hawaii, Honolulu, after a complete

review of said brief, will find that Movant should have his sentence vacated and remanded back to this Honorable United States District Court and have the Manager Leadership role removed and be re-sentenced accordingly.

Respectfully Submitted,



Leandro Gomez, III
40390-048
United States Penitentiary
P.O. Box 5500
Adelanto, California 92301